

# Minnesota Department of Natural Resources

500 Lafayette Road • St. Paul, MN • 55155-40



May 24, 2010

The Council on Environmental Quality

Attn: Ted Boling

722 Jackson Place, NW

Washington, DC 20503

**RE:** Comments on Draft Guidance for NEPA Mitigation and Monitoring

Mr. Boling:

The Minnesota Department of Natural Resources (MnDNR) has reviewed the above-described draft guidance and offers the following comments for your consideration.

The draft guidance indicates that “mitigation measures adopted by the agency should be identified as binding commitments to the extent consistent with agency authority.” In many cases agencies are preparing NEPA documents that provide information that other state or federal agencies will use under a different regulatory authority for the same action or project. For example, a federal agency may conduct a NEPA evaluation based upon its Section 404 wetlands jurisdiction, while state agencies are responsible for issuing air emission and water discharge permits under delegated federal permitting programs. Such state permitting actions generally undergo continued analysis and agency questioning beyond the EIS stage in order to ensure that all applicable standards and standards-based monitoring requirements are met. Additionally, these permits undergo their own public review process and involve a separate final agency decision that is subject to administrative and judicial review. The MnDNR is concerned that the creation of “binding commitments” in an EIS will undermine state agency discretion in permitting actions if applied too broadly. The draft guidance needs clarification as it does not provide any information on how an agency should address mitigation measures that are considered as part of NEPA, but are outside of the agency’s regulatory authority.

Many states, like Minnesota, have a state specific environmental policy that in some ways are similar to NEPA, but in other ways are different. For example, the Minnesota Environmental Policy Act (MEPA) does not use EISs as final decision documents. Each state agency with permitting authority over a project makes a final decision as part of issuing a permit or approval after the EIS is complete and uses the information contained in the EIS to inform those permit decisions. It is inherent in Minnesota law that an EIS conducts an analysis of potentially significant environmental impacts and recommends monitoring and mitigation measures that will aid the permitting agencies in making better informed decisions. A MEPA EIS does not tie the hands of the permitting agency, which needs discretion to draft a permit that may require equivalent or more stringent monitoring and mitigation in order to address all standards in its jurisdiction, including those that may not have been included in the EIS. This is of particular concern in cases where state agencies cooperate with federal agencies to prepare environmental documents to satisfy both federal and state environmental policy. In these instances, the draft guidance could create confusion for joint state/federal EISs with respect to how mitigation measures will be incorporated in final decisions.

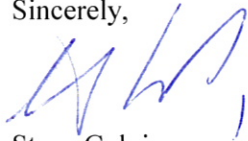
Previous NEPA guidance from *Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations* addresses mitigation measures under question number nineteen. In response to the question on how an EIS should treat mitigation measures that are outside the jurisdiction of the lead



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agency, this existing guidance indicates reasonable mitigation measures should be identified, but not committed to as part of the Record of Decision. It is not clear if the February 18, 2010 draft guidance proposes any change to this previously provided guidance. In order to avoid misinterpretation of the guidance, it would be helpful to clarify that mitigation measures outside of the lead agency's regulatory authority are not committed to as part of the Record of Decision, but are provided to inform final decisions by other agencies under separate regulatory authority.

Sincerely,



Steve Colvin  
Environmental Review Supervisor  
Minnesota Department of Natural Resources

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C: L. Kramka